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ALEXANDER L. STEVENS
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No. _____

(1)

In The

Supreme Court of the United States

October Term, 1983

CRAIG MEHRENS,

Petitioner,

v.

THE STATE OF ARIZONA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS,
STATE OF ARIZONA,
DIVISION ONE

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47 pp



I

QUESTIONS PRESENTED

I

DOES THE EXECUTION OF A SEARCH WARRANT ON A NON-SUSPECT ATTORNEY'S FILES FOR DOCUMENTS AUTHORED BY THE CLIENT VIOLATE THE REASONABLENESS CLAUSE OF THE FOURTH AMENDMENT, THE CLIENT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE?

II

DOES THE FOURTH AMENDMENT PERMIT "PROSPECTIVE" WARRANTS, THAT IS, THE ISSUANCE OF A SEARCH WARRANT FOR ITEMS STATED IN THE WARRANT TO BE AT A PLACE WHEN BOTH THE AFFIANT AND THE MAGISTRATE KNOW THE ITEMS ARE IN FACT NOT AT THE TARGETED LOCATION?

PARTIES INVOLVED

The caption of the case before this Court contains the names of all parties to the proceeding whose judgment is sought to be reviewed.



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Now comes Craig Mehrens, an individual, and prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of Arizona, Division One, entered in the above-entitled cause on September 13, 1983. Petition for Review was denied by the Arizona Supreme Court on January 10, 1984.

OPINIONS BELOW

The opinion of the Arizona Court of Appeals, Division One, CRAIG MEHRENS v. STATE OF ARIZONA, is reported at

___ Ariz. ___, 675 P.2d 718 (1983). It is reproduced in the Appendix hereto (marked A). The companion case of *State v. Superior Court*, reported at 128 Ariz. 253, 625 P.2d 316 (1981) is reproduced in the Appendix (marked B). The order denying the Motion for Reconsideration (marked C), the order denying the Petition for Review (marked D), and the Superior Court's order denying Petitioner's motion to contravene search warrant (marked E), are reproduced in the Appendix.

JURISDICTION

The federal questions sought to be reviewed were first raised in the Superior Court, Maricopa County, Arizona, by way of a motion to contravene search warrant (a civil proceeding; *Greehling v. State*, 135 Ariz. 498, 662 P.2d 1005 (1982)), challenging probable cause and reasonableness under the Fourth Amendment, and alleging a violation of the Sixth Amendment. On July 8, 1981, the Superior Court ruled that the search warrant was supported by probable cause, but that the search was unreasonable (Appendix E).

A timely appeal was filed to the Arizona Court of Appeals, Division One. On September 13, 1983, the court issued its opinion and held there was probable cause for the search warrant and the search was reasonable (Appendix A). Craig Mehrens moved for a reconsideration, which was denied on October 20, 1983 (Appendix C).

Craig Mehrens then filed a timely petition for review to the Arizona Supreme Court, which was denied on January 10, 1984 (Appendix D).

This Petition was filed within ninety days thereof, 28 U.S.C. § 2101(c) and jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Sixth Amendment to the United States Constitution provides, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

. . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

In July of 1980, Ronald Wayman retained Craig Mehrens, an attorney licensed to practice in Arizona, to represent him on charges of sexual conduct with his minor daughter. In seeking legal advice, Mr. Wayman gave Mr. Mehrens some personal letters Wayman had authored, which Mr. Mehrens retained, intending to use in his client's defense and repre-

sentation. When the State of Arizona learned of these letters it subpoenaed Mr. Mehrens to testify before a grand jury and to bring with him "... all personal letters written to Sandra Marie Wayman by Ronald A. Wayman ..." (Appendix B).

Counsel for Mr. Mehrens, Thomas A. Thinnes, filed a Motion to Quash the subpoena on the grounds that production of the letters would violate Mr. Wayman's attorney-client privilege, Fifth Amendment privilege against self-incrimination and his Sixth Amendment guarantee of effective assistance of counsel.

On August 14, 1980, a hearing on the motion was held in Superior Court, Maricopa County, Arizona. Prior to this hearing, the defense letters were placed in an envelope, sealed and delivered to Judge William French of the Superior Court, by Mr. Mehrens. On August 18, 1980, the Motion to Quash was granted:

The letters obtained by defendant's counsel from his client are protected from disclosure by the attorney-client privilege. To deny the Motion would violate the client's Fifth Amendment privilege against self-incrimination and Sixth Amendment right to assistance of counsel and private consultation with his lawyer. For these reasons,

IT IS ORDERED the Motion to Quash is granted.
(Appendix F)

The State of Arizona then filed a Petition for Special Action requesting the Arizona Supreme Court to direct Judge French to deny the Motion to Quash and order Mr. Mehrens to comply with the subpoena. The Arizona Supreme Court accepted jurisdiction of the matter and on January 27, 1981, issued its opinion (Appendix B).

The Arizona Supreme Court ruled that the letters were privileged from production and refused to grant to the State of Arizona the relief it requested:

Judge French, on Mehrens' motion, quashed the subpoena, being of the view that the letters were protected by the attorney-client privilege. Since we agree that the letters are protected by the attorney-client privilege, the relief requested is denied.

State v. Superior Court of Maricopa County, 128 Ariz. 253, 625 P.2d 316, 317 (1981). (Appendix B).

After this decision, on March 3, 1981, Superior Court Judge French ordered Craig Mehrens to pick up the letters by 9:00 a.m., March 4, 1981.

While the letters were still being held by the Superior Court, the State of Arizona, through the same county attorney who unsuccessfully challenged Judge French's order quashing the subpoena, sought a non-lawyer justice of the peace to sign a search warrant. The affidavit, sworn to by a Phoenix Police Officer, stated that the letters were ". . . on the person of Craig Mehrens or his agent." At the time the warrant was issued however, both the justice of the peace and the affiant (and the county attorney who instigated the application for the search warrant) knew that the letters were *not* with Craig Mehrens or his agent, but were being held by the Superior Court. A warrant was not issued for Judge French of the Superior Court because, as the issuing magistrate testified, that would have been "tacky" and, as the county attorney testified, the Superior Court held the letters under some type ". . . of judicial privilege."

On March 4th, Mr. Mehrens and his attorney, Thomas A. Thinnes, went to Superior Court to appear before Judge French. The State of Arizona was present through the county attorney. Judge French said he was transferring the case to Judge Stephen Scott. At that time, Mr. Thinnes requested Judge French to transfer the letters and any further proceedings to Judge Scott. The county attorney, who knew

police officers were waiting outside the courtroom with the search warrant, strenuously objected and demanded that the letters be returned to Mr. Mehrens. Over Mr. Thinnes' objection, the letters were returned to Mr. Mehrens, who placed them in his client's file in his briefcase.

Immediately after stepping outside the courtroom, police approached Mr. Mehrens and Mr. Thinnes with the search warrant. Mr. Mehrens and Mr. Thinnes, after being advised of the warrant, repeatedly requested that all of the parties walk over to Judge Scott's courtroom, where he was available, and ask the Judge for a stay or ruling on the search warrant's validity. These pleadings fell on deaf ears and the police seized Mr. Mehrens' entire briefcase. The police and county attorney then went to the county attorney's office, searched the briefcase, found, seized and copied the letters.

In the meantime, Mr. Mehrens and Mr. Thinnes went to Judge Scott's chambers and explained what had just occurred. Judge Scott then called the county attorney and ordered the county attorney to immediately proceed to his courtroom with the briefcase, including the letters and the copies made of them. Judge Scott took possession of the letters. Mr. Mehrens, through his attorney, Mr. Thinnes, then filed a motion to contravene the search warrant (a civil proceeding), challenging probable cause and reasonableness and alleging a violation of his client's Sixth Amendment right to effective assistance of counsel.

After lengthy evidentiary hearings, Judge Scott ruled that there was probable cause for issuance of the search warrant. He further ruled, however, that since the Arizona Supreme Court had held the letters were privileged and since there was never any possibility the letters would be lost or destroyed,

the search of Mr. Mehrens, an attorney, was unreasonable. In so ruling, however, Judge Scott also found that reasonableness was not an issue in a contravention of search warrant action pursuant to Arizona Revised Statutes, § 13-3922 (Appendix G). If it were,

. . . this Court would find the search warrant was not valid because it did not meet the requirement of overall reasonableness . . . The requirement of overall reasonableness in this case was not met because no matter how well the probable cause and specificity requirements were met, applied, policed and observed, the search may very well have resulted in privileged materials being seized and examined by law enforcement authorities.

* * *

Therefore, if the issues before this Court included the overall reasonableness of the seizure of the subject documents, this Court would hold the documents were unreasonably seized and therefore would sustain the contravention of this search warrant and return the documents to Mehrens. Further, this Court would order the documents and any fruits derived therefrom suppressed in response to a motion to suppress.

(Appendix E)

A timely appeal was filed. On appeal, counsel for Mr. Mehrens argued that there was no probable cause for issuance of the search warrant; that the warrant was invalid because it was unreasonably executed; that it was unreasonable to search an attorney and his file for letters written by his client; and that the client's Sixth Amendment right to effective assistance of counsel and attorney-client privilege were violated. Five issues were raised by appellant on appeal, including (1) whether the trial court erred in finding probable cause to support the issuance of the search warrant and (2) whether the seizure of the letters was unreasonable and violated United States constitutional provisions (Appendix A).

The Arizona Court of Appeals, failing to grasp the incredible importance and significance of the issues, held that there was probable cause for issuance of the search warrant, the search and seizure was reasonable and that the attorney-client privilege and the Sixth Amendment do not afford any protection from such a search warrant. The Arizona Supreme Court, on January 10, 1984, denied Mr. Mehrens' petition for review. It is from the opinion and decision of the Arizona Court of Appeals which Mr. Mehrens prays that a writ issue.

REASONS FOR GRANTING THE WRIT

I

ARIZONA HAS DECIDED A FEDERAL QUESTION IN DIRECT CONFLICT WITH THE SUPREME COURT OF MINNESOTA.

In *O'Connor v. Johnson*, 287 N.W.2d 400 (Minn. 1979), the Minnesota Supreme Court ruled that a search warrant authorizing the search of an attorney's office for documents of a client is unreasonable under the Fourth Amendment, where there is no threat that the documents sought will be destroyed and the attorney is not suspected of any wrongdoing.

The court further held that execution of said warrant would violate the client's Sixth Amendment right to effective assistance of counsel.

This decision is in conflict with the Arizona decision which held that a search warrant authorizing the search of a non-suspect attorney's file for client documents is reasonable and does not violate the client's right to effective assistance of counsel. In so doing, the Arizona Court erroneously relied on this Court's opinion in *Zurcher v. The Stanford Daily*, 436

U.S. 547, 98 S. Ct. 1970, 56 L. Ed. 2d 525 (1978), for the proposition that the search warrant to search Mr. Mehrens' files for letters authored by his client had been approved. *Zurcher, supra*, did not approve of search warrants for attorneys' files.

In *Zurcher, supra*, this Court did not address the Sixth Amendment and what, if any, protection it affords a client from a search warrant for his file in possession of his attorney. Furthermore, in *Zurcher, supra*, the target newspaper office announced a policy of destroying evidence which might aid the prosecution. Such was not the case in Arizona. The Superior Court had possession of the letters, there was no threat of destruction and Mr. Mehrens was not suspected of any wrongdoing. The defense letters were given to Mr. Mehrens by his client for legal advice (Appendix E). These circumstances are quite different than those before this Court in *Zurcher, supra*, and in fact, this Court cautioned that not all search warrants for non-suspect third parties were reasonable:

This is not to question that 'reasonableness' is the overriding test of compliance with the Fourth Amendment or to assert that searches, however or whenever executed, may never be unreasonable if supported by a warrant issued on probable cause and properly identifying the place to be searched and the property to be seized. 436 U.S. at 559, 98 S. Ct. at 1978.

This Court also quoted with approval the following language from *Roaden v. Kentucky*, 413 U.S. 496, 93 S. Ct. 2796, 37 L. Ed. 2d 757 (1973):

'A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material.'
436 U.S. at 564, 98 S. Ct. at 1981.

Mr. Mehrens and Mr. Thinnes requested that the police accompany them to Judge Scott's court with the search warrant, where Judge Scott was available. The requests were refused, demonstrating the unreasonableness of the execution of the search warrant in this "setting", and considering the "kind of material" seized.

Petitioner submits that a search warrant to search an attorney's files for letters authored by his client and delivered to him for more informed legal advice is unreasonable and falls squarely within the contemplation of the cautions articulated by this Court in *Zurcher* and *Roaden*, *supra*. This Court should thus grant the writ, and resolve the conflict between the Minnesota and Arizona Courts by deciding the issue.

II

ARIZONA HAS DECIDED AN EXTREMELY IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

This Court has not yet decided this issue which is incredibly important to attorneys and their clients. The issue embraces the Fourth and Sixth Amendments and the attorney-client privilege. It has great significance to prosecutors and law enforcement personnel, who have increasingly come to use the search warrant to gain access to attorneys' files across the United States. Noted Scholars have written about the problem of search warrants for attorneys' files and offices and the alarming rate of their frequency. There have been 83 such searches reported since 1979. *See*, Dershowitz, *Law Office Searches—The War on Crime Takes an Orwellian Turn*, Vol. 7 The Champion 6 (August, 1983).

It is submitted that this Court should decide this nation-

ally important issue. Prosecutors will no doubt continue to use search warrants for attorneys' files and offices, necessitating an opinion by this Court as to when, if ever, such warrants are reasonable. The private practitioner needs guidance from this Court in order to properly advise his or her clients, and to render effective assistance to the client.

Furthermore, because a search warrant is a colorable right to search, and not a demand to produce, police will, unintentionally or otherwise, access documents during a search not relevant or listed in a search warrant and violate the expectation of privacy and attorney-client privilege of hundreds of other clients.

Society surely recognizes, as one of an individual's highest expectations of privacy, matters and communications made to his or her attorney, a concept totally ignored by the opinion of the Arizona Court, which judicially approved, without restriction, search warrants for attorneys' files issued by non-lawyer justices of the peace.

Petitioner submits that the time honored attorney-client privilege, the Fourth Amendment guarantee of freedom from unreasonable searches and seizures, and the Sixth Amendment guarantee of effective assistance of counsel are of such importance in this context that review by this Court is not only warranted, but essential. Clients, prosecutors and private practitioners have the need, and the right to know what protections the Fourth and Sixth Amendments provide against search warrants for non-suspect attorneys, their files and offices. These reasons standing alone merit this honorable Court's consideration and review.

III

THE FOURTH AMENDMENT WARRANT PROCESS
DOES NOT PERMIT ISSUANCE OF A WARRANT
BASED UPON SPECULATIVE FUTURE EVENTS.

Finally, this Court should grant the writ to review Arizona's misinterpretation of the Fourth Amendment's requirements as to probable cause, to-wit; that the items sought in a search warrant are reasonably believed to be located at the targeted premises. *Zurcher v. The Stanford Daily*, 436 U.S. 547, 556, 98 S. Ct. 1970, 1976, 1977 (1978).

The Arizona Court created a completely new rule of law. It held that a "prospective" or "anticipatory" search warrant was valid under the Fourth Amendment.

The test to determine if probable cause exists for the issuance of a search warrant is the same for present as well as prospective warrants; namely, whether the evidence presented in support of the warrant creates a substantial probability that the seizable property will be located at the place authorized to be searched by the warrant. *Mehrens v. State*, ___ Ariz. ___, 675 P.2d 718, 721 (1983).

(Appendix A)

The opinion cites no United States Supreme Court authority for this proposition. This Court should grant the writ because it has not yet passed upon the validity of a warrant authorizing the search of a targeted premises, where both the affiant and issuing magistrate know the items sought are, in fact, not located at the targeted premises.

The Arizona Court reasoned that since the affiant was aware "... that appellant would reclaim possession of the letters at some time during business hours of the court ... " (Appendix A), the warrant was valid. This is mere speculation on the affiant's part.

The opinion adds new language to the Fourth Amendment.

If police show "... a substantial probability that the seizable property will be located at the place authorized to be searched . . .", a warrant is valid. This "test" is a long way from the language and interpretation of the Fourth Amendment articulated by this Court:

The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized *are located* on the property to which entry is sought. (Emphasis added). *Zurcher v. The Stanford Daily*, 436 U.S. at 557, 98 S. Ct. at 1976, 1977.

The search warrant authorizing the search of Craig Mehrens did not meet the above requirement. The Arizona Court agreed with this, then proceeded to rewrite the Fourth Amendment and validate the warrant.

Although the better practice is for the warrant to provide that execution of the warrant will not occur until the happening of some specified event, the warrant here is nevertheless valid. *Mehrens v. State, supra*, ___ Ariz. at ___, 675 P.2d at 721.

(Appendix A)

CONCLUSION

Because the Arizona Court has validated a warrant procedure by expanding the Fourth Amendment, and since this Court has not yet ruled on the legality of such a procedure, it is submitted that this honorable Court should grant the writ, as the issue merits this Court's consideration and review.

Respectfully submitted

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April, 1984.

APPENDIX A
IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In the Matter of the Appearance)	
and Attendance before the)	1 CA-CIV 6122
Grand Jury 32 GJ 191)	DEPARTMENT A
CRAIG MEHRENS,)	
)	
Appellant,)	OPINION
)	
v.)	
STATE OF ARIZONA,)	(Filed: 9/13/83)
)	
Appellee.)	

An Appeal from the Superior Court of Maricopa County
Cause No. 32 GJ 191

The Honorable Stephen H. Scott, Judge

AFFIRMED

(Names and addresses of Counsel of Record omitted)

FROEB, Judge

This appeal is from the denial of a petition under the contravention statute, A.R.S. § 13-3922, for the return of property seized pursuant to a search warrant.

Appellant Craig Mehrens, an attorney, represented Ronald Anthony Wayman on charges of child molestation of his minor daughter, Sandra Marie Wayman. During the course of their investigation of Wayman, police learned of letters written and sent by Wayman to his daughter which allegedly contained incriminating statements. A search warrant for the

Wayman home was obtained and executed, but the letters in question were not found. However, it was learned that Wayman had given the letters to appellant. At that point a subpoena duces tecum was issued directing appellant to produce the letters. Appellant refused to comply with the subpoena and moved to have it quashed on the ground that it violated the attorney-client privilege. The trial court granted the motion to quash and the letters in question were given to and held by the court at its request.

Thereafter, the state filed a petition for special action in the Arizona Supreme Court to contest the ruling. The supreme court affirmed the trial court, holding that appellant could not be compelled to produce the letters pursuant to a subpoena duces tecum. *See State v. Superior Court*, 128 Ariz. 253, 625 P.2d 316 (1981). The opinion, however, left unresolved the issue of whether the letters could be obtained by other means.

Following the supreme court's decision, the state then made a request to have the trial court release the letters. After hearing arguments, the trial court denied the request and ordered appellant to pick up the letters before nine o'clock the following morning.

The state then obtained a warrant directed to a search of appellant on the morning he was to pick up the letters at the courthouse.^{1/} When appellant left the court chambers after picking up the letters, the search warrant was served upon him by police officers. Appellant refused to voluntarily comply with the warrant and his briefcase containing the letters was then seized.

^{1/} The search warrant here is directed to a non-suspect third party of the type approved in *Zurcher v. The Stanford Daily*, 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978).

Appellant filed a contravention of search warrant, together with a separate request for damages. The request for damages has been abandoned. The trial court denied the contravention and this appeal followed.

The case involved the interpretation of the contravention statute, A.R.S. § 13-3922, which reads as follows:

If the grounds on which the warrant was issued are controverted, the magistrate shall proceed to take testimony relative thereto. The testimony given by each witness shall be reduced to writing and certified by the magistrate. If it appears that the property taken is not the same as that described in the warrant, or that probable cause does not exist for believing the items were subject to seizure, the magistrate shall cause the property to be restored to the person from whom it was taken, provided that the property is not such that its possession would constitute a criminal offense.

Five issues are raised by appellant on appeal.

1. Whether this court has jurisdiction to hear this appeal;
2. Whether the trial court erred in finding probable cause to support the issuance of the search warrant;
3. Whether the trial court erred in its finding that the items seized were the same as those described in the warrant;
4. Whether the trial court erred in construing the contravention statute too narrowly; and
5. Whether the seizure of the letters violated United States and Arizona constitutional provisions.

We address these issues in the order presented.

JURISDICTION

The issue of whether this court has jurisdiction to review a request for relief under the contravention statute has been resolved in appellant's favor by *Greehling v. State*, ___ Ariz.

_____, 662 P.2d 1005 (1982) (first Arizona Supreme Court opinion). We therefore proceed to discuss the merits of the appeal.

PROBABLE CAUSE TO ISSUE THE WARRANT

The grounds upon which a search warrant is issued may be controverted upon a showing that there was no probable cause for its issuance. A.R.S. § 13-3922. For a search warrant to issue there must be probable cause to believe that an offense has been committed and that evidence exists at the place for which a warrant is sought. *See* A.R.S. § 13-3912(4); *State v. Hale*, 131 Ariz. 444, 641 P.2d 1288 (1982); *Zurcher v. The Stanford Daily*, 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed. 2d 525 (1978). A search warrant is presumed valid and the defendant has the burden of proving its invalidity. *Greehling v. State*, No. 16139-PR (Ariz. Sup. Ct. May 2, 1983) (second Arizona Supreme Court opinion).

Appellant argues that the trial court erred in finding probable cause to believe the letters were subject to seizure. He contends the Arizona Supreme Court ruled the letters were protected by the attorney-client privilege, *State v. Superior Court*, and that a search warrant was not the proper vehicle for obtaining them. We find no merit to this argument. Appellant misconstrues the holding of the court in *State v. Superior Court*. The court held only that appellant could not be *compelled under the subpoena* to produce the requested letters. The opinion expressly left open the question of whether the letters could be obtained by another means. Appellant conceded in the trial court that had the letters been in Wayman's possession they could have been lawfully seized from him pursuant to a valid warrant. We are referred to no authority which would prohibit the state from obtaining otherwise seizable evidence because it is placed in the

possession of an attorney. To so hold would mean that a defendant could shield the evidence by the simple expedient of delivering it to his attorney.

In the alternative, appellant argues that the search warrant was invalid because there was no probable cause to believe the letters were in his possession at the time the warrant was issued.^{2/} Appellant argues that a prospective warrant is invalid. There is authority, however, authorizing an anticipatory search warrant and holding that it is not proscribed by the fourth amendment. *State v. Cox*, 110 Ariz. 603, 522 P.2d 29 (1974); see generally 1 W. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment* § 3.7(c) at 699-700 (1978). This is so when it can be shown that the right to search will exist within a reasonable time in the future. *State v. Cox*.

The test to determine if probable cause exists for the issuance of a search warrant is the same for present as well as prospective warrants; namely, whether the evidence presented

^{2/} The affidavit in support of the warrant stated the following:

A Motion for Hearing For Release of Sealed Documents was filed on February 20, 1981. Pursuant to that motion, JUDGE FRENCH ordered that the motion for a hearing is denied and the attorney for the defendant must obtain the sealed documents no later than 9:00 a.m., on March 4, 1981 from JUDGE FRENCH's court. This motion was denied on March 3, 1981 at 4:30 p.m.

It is my belief that subsequent to normal court hours on March 4, 1981, CRAIG MEHRENS, or his agent, will receive custody of these sealed documents. It is also my belief that these sealed documents are of evidentiary value and, therefore, should be seized from the person of CRAIG MEHRENS or his agent.

The warrant was issued in the early morning of March 4, 1981. Appellant argues that at the time the warrant was issued there was no probable cause to believe that appellant was in possession of the letters.

in support of the warrant creates a substantial probability that the seizable property will be located at the place authorized to be searched by the warrant. *State v. Cox*. Here, the affidavit reflects the affiant's awareness that appellant would reclaim possession of the letters at some time during the business hours of the court prior to 9:00 A.M., on March 4, 1981. Although the better practice is for the warrant to provide that execution of the warrant will not occur until the happening of some specified event, the warrant here is nevertheless valid. See *Johnson v. State*, 617 P.2d 1117 (Alaska 1980) (holding that the judge's failure to insert a direction in the search warrant making execution contingent upon the happening of an event which evidences probable cause that the item to be seized is in the place to be searched, did not invalidate the warrant where it was unlikely the police would frustrate their efforts by executing the warrant prematurely).

Cases relied upon by appellant are distinguishable. In both *State v. Berge*, 130 Ariz. 135, 634 P.2d 947 (1981) and *State v. Vitale*, 23 Ariz. App. 37, 530 P.2d 394 (1975), there was no probable cause to believe that criminal activity occurred or would occur prior to the issuance of an anticipatory warrant. In the present case there was probable cause to believe that a crime had occurred and that the letters were subject to seizure.^{3/} We find this case to be closer to *State v.*

^{3/} See A.R.S. § 13-3912, which reads:

A search warrant may be issued upon any of the following grounds:

* * *

4. When property or things to be seized consist of any item or constitute any evidence which tends to show that a particular public offense has been committed, or tends to show that a particular person has committed the public offense.

Cox in which the Arizona Supreme Court upheld the issuance of an anticipatory warrant. In that case the affidavit established that items would be subject to seizure at a reasonable time in the future. We conclude that there was sufficient probable cause for the issuance of the warrant in this case and that it did not call for execution beyond a reasonable time.

DESCRIPTION OF THE PROPERTY SEIZED

Appellant next argues that the property seized was not the same as that described in the search warrant. The warrant described the following property to be seized: "A sealed envelope containing personal letters written to Sandra Marie Wayman by Ronald A. Wayman." When appellant refused to comply voluntarily with the execution of the warrant, his briefcase with the sealed envelope containing the letters was seized. Although the officers declined appellant's request to argue the propriety of the warrant immediately before a superior court judge, there is no indication that they refused to allow appellant to be present when they opened his briefcase and removed the letters. When the briefcase was opened in the presence of disinterested witnesses, the scope of the search was limited to obtaining the sealed envelope containing the letters. Although appellant's briefcase contained his client's file and other confidential matters, these items were not disturbed or examined by the officers. Once the letters were removed, appellant's briefcase was closed and immediately returned to him.

In our opinion, the officers did not act unreasonably in seizing appellant's briefcase. It was not seized until appellant had refused to voluntarily comply with the warrant, and only after he was first searched. It was reasonable to conclude

that the letters, if they were not on appellant's person, would be in his briefcase. In this respect, we follow the rationale of the court in *State v. Caldwell*, 20 Ariz. App. 331, 512 P.2d 863 (1973) (search may extend to all areas necessarily a part of the place searched and so inseparable as to constitute a part thereof).

The fourth amendment requires that the description in the warrant be of sufficient particularity as to enable the searching officer to ascertain and identify the place intended to be searched. *State v. Boniface*, 26 Ariz. App. 118, 546 P.2d 843 (1976). Where voluntary compliance is refused, we do not find it unreasonable for the officers to take the next step to locate the letters in appellant's briefcase.

APPLICATION OF A.R.S. § 13-3922

In denying appellant's request for relief under the contravention statute, the trial court interpreted A.R.S. § 13-3922 as limited to attacks on the sufficiency of evidence supporting the issuance of the warrant. Appellant argues that even if the warrant were properly issued, it was unreasonably *executed* and he was entitled to relief under the contravention statute. The trial court found that A.R.S. § 13-3922 does not deal with the manner of execution of a search warrant and therefore does not authorize contravention on the ground that the execution was unreasonable. We agree. Appellant refers us to no contrary authority.

Even assuming reasonableness of execution were susceptible to inquiry under A.R.S. § 13-3922 and that the seizure were in fact not reasonably executed, we are unable to conclude that the letters should be restored to appellant.

In effect, appellant asks us to adopt a rule requiring the restoration of all evidence seized pursuant to a valid search warrant where items improperly seized are also taken. We

decline to adopt this rule. When the officers returned appellant's briefcase to him, appellant obtained the relief to which he was entitled under A.R.S. § 13-3922. We note as persuasive the rationale of the court in *United States v. Heldt*, 668 F.2d 1238 (D.C. Cir. 1981), *cert. denied*, 102 S.Ct. 1971 (1982). There, the court refused to suppress all the fruits of a general search where there was evidence that the officers seized several documents outside the scope of the search. The court stated:

We recognize that in some cases a flagrant disregard for the limitations in a warrant might transform an otherwise valid search into a general one, thereby requiring the entire fruits of the search to be suppressed. (citations omitted). If in this case law enforcement officers had conducted a document search as if no limiting warrant existed, rummaging at will among defendants' offices and files, then the mere existence of a valid—but practically irrelevant—warrant for certain specified documents would not be determinative of whether the search was so unreasonable as to require suppression of everything seized. Defendants do show several instances where documents were seized outside the warrant, but they do not demonstrate such flagrant disregard for the terms of the warrant which might make the drastic remedy of total suppression necessary. Absent that sort of flagrant disregard, the appropriate rule seems to be that where officers seize some items outside the scope of a valid warrant, this by itself will not affect the admissibility of other contemporaneously seized items which do fall within the warrant. (citations omitted).

668 F.2d at 1259-60.

CONSTITUTIONAL ISSUES

Appellant raises several constitutional issues relating to the seizure as grounds for relief under A.R.S. § 13-3922. The arguments are largely based upon the assumption that the letters are protected from seizure by reason of the attorney-client privilege. There is, however, no attorney-client privilege

attached to the letters. Contrary to appellant's argument, the Arizona Supreme Court has not suggested that the letters are protected from seizure by the attorney-client privilege. In *State v. Superior Court*, the court ruled that a subpoena duces tecum directed to appellant and calling for "[a]ny and all personal letters written . . . by Ronald A. Wayman" implicated both the attorney-client privilege and the privilege against self-incrimination. *The reason, however, was that compliance with the subpoena would have authenticated the fact that Wayman was the author of the letters.* That is not the problem here. The letters arguably written by Wayman and sent to his daughter may constitute admissible evidence. The attorney-client privilege and the privilege against self-incrimination are not involved and do not bar their seizure. Since the letters could be seized from Wayman, they may likewise be seized from his attorney under a proper warrant. *Fisher v. United States*, 425 U.S. 391, 96 S.Ct. 1569, 48 L. Ed.2d 39 (1976).

Appellant failed to controvert the warrant as provided in A.R.S. § 13-3922 and therefore the trial court did not err in denying the petition to have the letters restored to his possession.

Affirmed.

/s/

DONALD F. FROEB, Judge

CONCURRING:

/s/

JACK L. OGG, Judge

/s/

ROBERT J. CORCORAN, Judge

APPENDIX B

[128 Ariz. 253, 625 P.2d 316 (1981)]

STATE of Arizona ex rel. Charles F. HYDER,
Maricopa County Attorney,
Petitioner,

v.

The SUPERIOR COURT OF MARICOPA COUNTY, Arizona;
Honorable William P. French, Judge of the Superior
Court; Craig Mehrens, Attorney At Law, for Relator;
and Relator in 32 G.J. 191, real party in interest,
Respondents.

No. 15022

Supreme Court of Arizona,
In Banc.

Jan. 27, 1981.

Rehearing Denied March 3, 1981.

* * *

STRUCKMEYER, Chief Justice.

This special action was brought to vacate the order of the Honorable William P. French, Judge of the Superior Court of Maricopa County, Arizona, quashing a subpoena duces tecum. The subpoena was directed to Craig Mehrens, an attorney licensed to practice in Arizona. It ordered him to appear and testify before a grand jury, and to produce "all personal letters written to SANDRA MARIE WAYMAN by RONALD A. WAYMAN between August 1979, and March 1980 * * *." Ronald Wayman is a client of Mehrens. He has been charged with two counts of sexual conduct with a minor, his daughter, Sandra Marie. Judge French, on Mehrens' motion, quashed the subpoena, being of the view that the letters were protected by the attorney-client privilege. Since we agree that

the letters are protected by the attorney-client privilege, the relief requested is denied.

It is the State's position that Wayman engaged in certain sexual conduct with a minor, his daughter, in 1979. Subsequent thereto, she left Arizona to live in California. While she was in California, Wayman wrote and mailed certain letters to her in which, assertedly, the sexual conduct was discussed. In March, 1980, Sandra returned to her parents' home in Arizona, bringing the letters with her. On July 3, 1980, she left home again, but did not take the letters with her. One week later, the criminal complaint in this case was filed. A search warrant was issued to obtain certain incriminating items from the Waymans' residence, including the letters. The letters, however, were not found in the search because prior to the search Wayman delivered the letters to Mehrens. They were being kept by Mehrens when a subpoena duces tecum issued in Maricopa County Grand Jury Proceeding 32 GJ 191 on August 5, 1980, directed him to appear and bring the letters. Mehrens moved to quash the subpoena and delivered the letters under seal to Judge French, who ruled quashing the subpoena, as stated.

The State asserts that Wayman stole the letters from his daughter and that they were delivered to Mehrens so their discovery would be impeded. There are, however, no evidentiary facts before this Court which support these assertions. Mehrens, on the other hand, filed certain affidavits. The affidavit of Wayman's wife implies that the letters were not stolen but were abandoned by Sandra when she left the Waymans' residence. Mehrens' affidavit says the letters were given to him in order that he might advise Wayman as to his legal rights. Since the affidavits support Mehrens' position, we assume for the purpose of this decision that the letters were

not stolen and were delivered to Mehrens in furtherance of his legal representation.

In a special action, an appellate court will ordinarily not weigh the evidence on which the decision in the court below was made. We will only consider whether the decision either totally lacks any evidence to support it or is contrary to uncontradicted and unconflicting evidence. *Bishop v. Law Enforcement Merit Sys. Council*, 119 Ariz. 417, 421, 581 P.2d 262 (App. 1978); *Arizona Dept. of Public Safety v. Dowd*, 117 Ariz. 423, 426, 573 P.2d 497 (App. 1977).

The record here establishes that the subpoena was quashed because of the attorney-client privilege.¹ The attorney-client privilege prevents a lawyer from being compelled to produce a document of a client which pre-exists the attorney-client relationship if the document was transferred to the attorney to further his legal advice *and if the client himself would be privileged from producing the document*. *Fisher v. United States*, 425 U.S. 391, 403-405, 96 S.Ct. 1569, 1577-1578, 48 L.Ed.2d 39 (1976). Cf. *Buell v. Superior Court of Maricopa County*, 96 Ariz. 62, 68-69, 391 P.2d 919 (1964) (recognizing that privilege covers documents delivered to attorney to secure legal advice, but not if delivered in furtherance of fraud or crime).

¹ In moving to quash the subpoena, Mehrens also invoked his client's right against compelled self-incrimination guaranteed by the Fourteenth Amendment. Since that right is a personal one, Mehrens may not claim it on behalf of his client. *Fisher v. United States*, 425 U.S. 391, 397, 96 S.Ct. 1569, 1574, 48 L.Ed.2d 39 (1976); see *State v. Myers*, 117 Ariz. 79, 87, 88, 570 P.2d 1252 (1977). This is not a case where constructive possession of the subpoenaed documents by the client is so clear or relinquishment of possession by the client is so temporary and insignificant as to leave the personal compulsion on the client substantially intact, and, thus, permit Mehrens to claim privilege on behalf of his client. See *Fisher v. United States*, *supra*; *Couch v. United States*, 409 U.S. 322, 333, 93 S.Ct. 611, 618, 34 L.Ed.2d 548 (1973).

We therefore turn to the question of whether the respondent judge was correct in holding that under the circumstances of this case the privilege against self-incrimination would invalidate a subpoena directed at Mehrens' client. This question was left open in *Fisher v. United States*, supra, 425 U.S. at 414, 96 S.Ct. at 1582, the Court saying:

"Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his 'private papers,' * * *."

The Fifth Amendment to the federal constitution, which applies to the states through the Fourteenth Amendment's due process clause, *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S.Ct. 1489, 1492, 12 L.Ed.2d 653 (1964), provides in its relevant part:

"No person * * * shall be compelled in any criminal case to be a witness against himself * * *." United States Const., Amend V.

The reference to "a witness" in the federal constitution prohibits not only compulsory incriminating oral testimony but any compulsory incriminating communicative act. *Schmerber v. State of California*, 384 U.S. 757, 763-764, 86 S.Ct. 1826, 1831-1832, 16 L.Ed.2d 908 (1966).

The Court in *Fisher* acknowledged numerous decisions have held that the Fifth Amendment prohibits the production of a person's private papers against his wishes. 425 U.S. at 408-409, 96 S.Ct. at 1580. These cases were based on the idea, apparently first articulated in *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), that the self-incrimination clause is intimately related to the search and seizure prohibition of the Fourth Amendment and creates, like the Fourth Amendment, a private enclave where

an individual may lead a private life without governmental intrusion. See *id.*, 116 U.S. at 633, 6 S.Ct. at 534; *Fisher v. United States*, 425 U.S. at 416, 96 S.Ct. at 1583 (Brennan concurring). The *Fisher* Court, however, rejected the idea that the Fifth Amendment is based on privacy principles, holding instead that the purpose of the self-incrimination clause was not to achieve a general protection of privacy but to prevent the specific evil of compelled self-incrimination.² 425 U.S. at 399-400, 96 S.Ct. at 1575-1576.

Compelled self-incrimination occurs when an individual is forced to make an incriminating communicative act. *Fisher v. United States*, 425 U.S. at 408, 96 S.Ct. at 1579; *In re Grand Jury Proceedings United States*, 626 F.2d 1051, 1055 (1st Cir. 1980); *United States v. Beattie*, 541 F.2d 329 (2nd Cir. 1976); *Matter of Grand Jury Empanelled*, 597 F.2d 851, 859-860 (3rd Cir. 1979); *United States v. Authement*, 607 F.2d 1129, 1131 (6th Cir. 1979); *United States v. Osborn*, 561 F.2d 1334, 1338 (9th Cir. 1977); Note, 18 Bost.Co.Ind. & Comm.L.Rev. 998, 1008-1016 (1977). While most federal appellate courts accept the foregoing statement as the test, some have taken the Court's reservation of the question in *Fisher* to mean that the per se prohibition against the compelled production of private papers of *Boyd* is still viable. See *In re Grand Jury Proceedings (Johanson)*, 632 F.2d 1033 (3rd Cir. 1980); *In re Grand Jury Proceedings (McCoy)*, 601 F.2d 162, 167 (5th Cir. 1979). We do not, however, think the Supreme Court could have been more specific in rejecting privacy as the predicate for the Fifth Amendment.

² In discussing the Fourth and Fifth Amendments, Wigmore states that "the two doctrines * * * had totally different political and legal histories", thus any intimate relation doctrine is fallacious. 8 Wigmore, *Evidence* § 2264(2), n. 4 (McNaughton rev. 1961).

The documents sought from the taxpayers' attorneys in *Fisher* were the workpapers created by accountants in preparing the taxpayers' returns. Letters were also sought, but the Court stressed that these letters were written by the accountants and sent to the taxpayers. 425 U.S. at 413, n. 13, 96 S.Ct. at 1582, n. 13. By responding to the subpoena, the taxpayers would admit the existence of the papers and their possession of them. The Court noted, however, that such admissions would not be incriminating for "it is not illegal to seek accounting help in connection with one's tax returns or for the accountant to prepare workpapers and deliver them to the taxpayer." *Id.*, 425 U.S. at 412, 96 S.Ct. at 1581. The Court said:

"As for the possibility that responding to the subpoena would authenticate the workpapers, production would express nothing more than the taxpayer's belief that the papers are those described in the subpoena. The taxpayer would be no more competent to authenticate the accountant's workpapers or reports by producing them than he would be to authenticate them if testifying orally. The taxpayer did not prepare the papers and could not vouch for their accuracy. The documents would not be admissible in evidence against the taxpayer without authenticating testimony. Without more, responding to the subpoena in the circumstances before us would not appear to represent a substantial threat of self-incrimination." 425 U.S. at 412-413, 96 S.Ct. at 1582 (footnotes omitted).

The subpoena in the instant case is directed to "Any and all personal letters written * * * by RONALD A. WAYMAN * * *." Unlike *Fisher*, compliance with this subpoena would authenticate these letters since in producing them Wayman admits, by the wording of the subpoena, that he is their author. If the letters contain incriminating information, they would be relevant and could be admitted under Rule 801(d)

(2), Arizona Rules of Evidence, 17A A.R.S., as admissions by party-opponent. They would be admissible, however, only if there were proof that the letters were written by Wayman. See 7 Wigmore, Evidence §§ 2129, 2130 (Chadbourn rev. 1978). Since the State would have testimony that these letters were turned over by Wayman under a subpoena requesting letters he authored, see *In re Grand Jury Proceedings United States*, supra at 1055; *United States v. Plesons*, 560 F.2d 890, 893 (8th Cir. 1977), the production would be a communicative act that provides the key to the admission of the letters into evidence against him. The production would be an incriminating communicative act within the protective ambit of the Fifth and Fourteenth Amendments to the federal constitution.³ This result has been reached in similar situations by the federal courts. See, e. g., *In re Grand Jury Proceedings United States*, supra; *United States v. Beattie*, supra; see also, *United States v. Plesons*, supra.

It is not relevant that the letters have been read by others, that they were sent to another with apparently no desire to have them returned or even that the letters could be authenticated by some other means than through mention of Way-

³ "No meaningful distinction can be drawn between a communication necessarily implied by legally compelled conduct and one authenticating the articles expressly made under compulsion in court. Testimonial acts of this sort—authenticating or vouching for preexisting chattels [or documents]—are not typical of the sort of disclosures which are caught in the main current of history and sentiments giving vitality to the privilege. Yet they are within the borders of its protection." 8 Wigmore, Evidence § 2264(1), p. 380 (McNaughton rev. 1961). Judge Friendly is in accord with this statement. See *United States v. Beattie*, 522 F.2d 267, 270 (2nd Cir. 1975), remanded 425 U.S. 967, 96 S.Ct. 2163, 48 L.Ed.2d 791 (1967), affirmed as modified, 541 F.2d 329 (1976), where he wrote that a "subpoena demanding that an accused produce his own records is * * the equivalent of requiring him to take the stand and admit their genuineness * * *." See also, *Schmerber v. State of California*, supra, 384 U.S. at 763-764, 86 S.Ct. at 1832.

man's compliance with the subpoena.⁴ *In re Grand Jury Proceedings United States*, supra, at 1056-1057; *United States v. Beattie*, supra at 331. This becomes obvious when it is understood that the evil to be prevented is not the invasion of Wayman's privacy or the production of the letters, but the fact that Wayman wrote the letters, which results from the compelled production. The "Fifth Amendment protects against compelled self-incrimination, not the disclosure of private information." *Fisher v. United States*, supra, 425 U.S. at 401, 96 S.Ct. at 1576 (brackets and quotes omitted); see *Andresen v. Maryland*, 427 U.S. 463, 473, 96 S.Ct. 2737, 2745, 49 L.Ed.2d 627 (1976).

We do not hold that these letters cannot be obtained or used against Wayman. We simply conclude under the facts before this Court the production of these letters under a subpoena directed to Wayman violates the privilege against self-incrimination. Since Wayman was not required to obey the subpoena, his attorney was also privileged under the attorney-client privilege from complying with it. The attorney is but the agent of the client. See 8 Wigmore, Evidence § 2307 (McNaughton rev. 1961).

Relief denied.

HOLOHAN, V.C.J., HAYS, J., and OGG and FROEB, Judges, Court of Appeals, concur.

Note: In the absence of Justice JAMES DUKE CAMERON and FRANK X. GORDON, Jr., Judges JACK L. OGG and DONALD F. FROEB, Court of Appeals, Division I, were called to sit in their stead.

⁴ See Rule 901(b), Arizona Rules of Evidence, 17A A.R.S.

APPENDIX C

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

(Title of Action; see p. 1a *supra*.)

(Filed: 10/20/83)

ORDER

The motion for reconsideration and the response thereto were considered by the court, Judges Donald F. Froeb, Jack L. Ogg and Robert J. Corcoran participating.

IT IS ORDERED denying the motion.

DATED this 20th day of October, 1983.

/s/
DONALD F. FROEB, Judge

(Verification of mailing omitted.)

APPENDIX D

SUPREME COURT
STATE OF ARIZONA

(Title of Action; see p. 1a *supra*.)

Supreme Court
No. 17265-PR

January 11, 1984

The following action was taken by the Supreme Court of the State of Arizona on January 10, 1984 in regard to the above-entitled cause:

“ORDERED: Petition for Review = DENIED.”

Record returned to the Court of Appeals, Division One, Phoenix, this 11th day of January, 1984.

S. ALAN COOK, Clerk

By /s/
Deputy Clerk

(Verification of mailing omitted.)

APPENDIX E
IN THE SUPERIOR COURT
OF
MARICOPA COUNTY, STATE OF ARIZONA

Div. 30-H July 8, 1981 HON. STEPHEN H. SCOTT, Judge

(MINUTE ENTRY)

(Title of Action; see p. 1a *supra*.)

Craig Mehrens (Mehrens), through counsel, has filed a Controvention of Search Warrant and Petition for Damages relating to a search warrant issued March 4, 1981, which authorized seizure of "a sealed envelope containing personal letters written to Sandra Marie Wayman by Ronald A. Wayman," which the Magistrate had found probable cause to believe were on the persons of "Craig Mehrens or his Agent" and on the premises known as "Maricopa Superior Court Building, 101 W. Jefferson, East Court Building".

The State filed a response and a supplemental response to said Controvention of Search Warrant and Petition for Damages and an evidentiary hearing was held at which time the facts surrounding the issuance and execution of the search warrant were made a matter of record. Since the proceedings in this matter preceding the evidentiary hearing are well-documented by the pleadings in the file, and the testimony is a matter of record, this Court will not recite either the background of this case or the evidence received in the evidentiary hearing. Should there be a review of this Court's decision by an Appellate Court, those matters are fully covered by the record that has been made and prepared in this case.

At the conclusion of the evidentiary hearing held by this Court, the Petition for Damages was dismissed, this Court being of the opinion that the issue of damages was not properly before this Court and therefore this Court did not have

jurisdiction to rule on the issue of damages.

At the conclusion of the evidentiary hearing, the Court took under advisement the issues properly before it, which are those set forth in A.R.S. 13-3922, specifically:

1. Was the property taken the same as that described in the search warrant;

2. Did probable cause exist for believing the items referred to in the search warrant were subject to seizure?

In *Zurcher v. Stanford Daily*, 436 U.S. 547, 565 (1978), the Supreme Court of the United States reiterated the preconditions for a valid search warrant, namely, probable cause, specificity with respect to the place to be searched and the things to be seized and overall reasonableness. Applying those guidelines to the search warrant and facts of this case, this Court finds that the search warrant involved in this matter fully complied with the requirements of probable cause and specificity, but did not comply with the requirement of overall reasonableness. It would appear, however, that the issue of overall reasonableness is not properly before this Court at this time and that it is not one of the issues that this Court can resolve when a search warrant is controverted pursuant to A.R.S. 13-3922. For the reasons stated below, this Court does not sustain the Controvention of the Search Warrant.

After reviewing all of the evidence in this matter and considering the written and oral arguments of counsel, this Court has come to the following conclusions which will be listed herein without reference, for the most part, to the facts supporting those conclusions:

1. The primary issue to be resolved in this matter is whether the documents seized pursuant to the search warrant in question were protected by the attorney-client privilege from such seizure.

2. This case does not involve the attorney work-product privilege.

3. The custodial attorney, Mehrens, is not and could not

reasonably be considered a suspect in illegal activity and is, therefore, a non-suspect third party custodian of the documents in issue.

4. There is not now, nor was there at the time the search warrant was issued, any basis in fact or reason to believe Mehrens would destroy, conceal or otherwise fail to produce these documents for a judicial determination on whether the documents were protected by the attorney-client privilege from a search warrant or that after a judicial determination that the documents were not protected by the attorney-client privilege that Mehrens would fail to produce those documents in compliance with an order of the court. In regard to this issue, the record clearly shows that Mehrens always made the documents available when requested by a Superior Court Judge and, in fact, prior to the execution of any search warrant offered to have copies of the documents made and deposited with the Superior Court pending a determination of the attorney-client privilege issue.

5. There is no factual basis to find that Mehrens' client, Ronald A. Wayman, stole the subject letters and delivered them to Mehrens to impede their discovery.

6. The search warrant in this case did not authorize a general, exploratory rummaging of Mehrens' law office.

7. The subject documents were seized from Mehrens' briefcase, but the record establishes that other documents and/or files in the briefcase were not seized or examined by the law enforcement officers executing the search warrant.

8. The documents were delivered to Mehrens by Wayman to obtain more-informed legal advice.

9. Information and documents that are protected by the attorney-client privilege were not seized or examined during the execution of this search warrant.

10. The documents that were seized are not protected by the attorney-client privilege from being seized pursuant to a search warrant that is validly written, obtained, and executed, and which in all respects applies with the requirements of a

valid search warrant discussed in *Zurcher*.

This Court has found no authority for the proposition that a search warrant which complied in all respects with legal and constitutional requirements cannot be issued for a non-suspect third party who has custody of items which are evidence of criminal activity. On the contrary, *Zurcher* states to the contrary. Furthermore, the Court has found no authority that states that the fact the non-suspect third party custodian of evidence is an attorney requires any different rule than that discussed in *Zurcher*.

The primary case relied upon by Mehrens in this matter, *O'Connor v. Johnson*, 287 N.W.2d 400 (1979) does not help resolve the issue presently before this Court because it sets forth a subpoena preference rule. The documents in this case have already been deemed protected from a valid subpoena by the attorney-client privilege. *State ex rel. Hyder v. The Superior Court of Maricopa County Arizona, et al*, (No. 15022, Supreme Court of Arizona, January 27, 1981). Further, the Supreme Court of the United States held in *Zurcher* that the Fourth Amendment to the Constitution of the United States does not require a subpoena preference rule when law enforcement officers seek evidence in the possession of a non-suspect third party. And, finally this Court has not found anything in the Constitution of the State of Arizona that would require a different result.

The law seems clear that if an individual's privilege against self-incrimination would render that individual privileged from producing documents and/or evidence, then an attorney to whom such documents or evidence has been transferred to further his legal representation, would also be privileged from producing that document or evidence. That is the situation in the present case in relation to obtaining the documents pursuant to a subpoena, *State of Arizona ex rel. Hyder v. The Superior Court of Maricopa County Arizona, et al*, (No. 15022, Supreme Court of Arizona, January 27, 1981). However, in the opinion of this Court, Ronald Wayman himself

would not be privileged from having the subject documents seized pursuant to a valid search warrant and, therefore, even though these documents were transferred to Mehrens in furtherance of Mehrens' legal representation of Wayman, the attorney-client privilege is not a valid shield to the search warrant in question.

The Supreme Court of the United States has stated:

" . . . pre-existing documents which could have been obtained by Court process from the client when he was in possession may also be obtained from the attorney by similar process following transfer by the client in order to obtain more informed legal advice, *Fisher v. U.S.*, 425 U.S. 391, 403 (1976)."

It is the opinion of this Court that Mr. Wayman could not block seizure of the subject documents by raising his privilege against self-incrimination because seizure of these documents pursuant to a valid search warrant does not "compel" Mr. Wayman to do anything, including authenticating the documents referred to in the search warrant.

Again, the Supreme Court of the United States has stated:

"Thus, although the Fifth Amendment may protect an individual from complying with a subpoena for the production of his personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating information . . . , a seizure of the same materials by law enforcement officers differs in a crucial respect - - the individual against whom the search is directed is not required to aid in the discovery, production or authentication of incriminating evidence, *Andresen v. Maryland*, 427 U.S. 463, 473 (1976).

Additionally, this Court has found no authority for the proposition that before probable cause can exist for believing that items are subject to seizure from a non-suspect attorney, that the Magistrate issuing the search warrant must find probable cause to believe that the items to be seized are not protected by the attorney-client privilege.

Therefore, with regards to the issues properly before this Court at this time, pursuant to A.R.S. 13-3922, this Court Finds that the documents that were seized were the same as those described in the search warrant and that probable cause did exist for believing the items were subject to seizure. As indicated earlier, the Court Finds the specificity and probable cause requirements for the search warrant are met, and since that determination seems to resolve the issues presented pursuant to A.R.S. 13-3922, this Court must, and does, overrule the objections made to the search warrant in question as listed in the Controvention of Search Warrant.

However, this Court feels compelled to state if this were a Motion to Suppress the items seized and therefore the issue of overall reasonableness was before this Court, that this Court would find the search warrant was not valid because it did not meet the requirement of overall reasonableness. This Court is of the opinion that overall reasonableness in relation to a search warrant for a non-suspect attorney requires that a judicial officer resolve, prior to the documents being examined by the law enforcement authorities, any claim that the documents are protected by the attorney-client privilege. Even though this Court has now determined that the documents in question are not protected by the attorney-client privilege, such a judicial determination was not made prior to the documents being seized and examined by law enforcement officers. The requirement of overall reasonableness in this case was not met because no matter how well the probable cause and specificity requirements were met, applied, policed and observed, the search may very well have resulted in privileged materials being seized and examined by law enforcement authorities. The fact that such privileged materials were not examined in the present case is only because the documents to be seized were clearly marked and, luckily, were the first and only items removed from Mehrens' briefcase.

Furthermore, there was clearly a valid claim of attorney-

client privilege to be resolved in this case and Mr. Mehrens and his attorneys requested that issue be judicially determined prior to any seizure or examination of the requested documents. They offered and requested that the subject documents be duplicated and transferred under seal to a judge prior to their being examined by the authorities. This offer, although reasonable, was rejected, and under the circumstances of this case, and any other case where there is a reasonable opportunity to resolve the question of attorney-client privilege prior to the documents being examined, such a judicial determination should be made.

To argue that suppression of seized materials and their fruits would be a satisfactory remedy if, after seizure and examination the claim of attorney-client privilege were upheld, does not satisfactorily resolve the problems of violating the attorney-client privilege. Once that privilege is violated, such a violation cannot be undone and it is so essential to an individual's constitutional right to counsel, that where at all possible, a determination of the validity of the claim of attorney-client privilege should be made prior to the documents being examined.

Therefore, if the issues before this Court included the overall reasonableness of the seizure of the subject documents, This Court would hold the documents were unreasonably seized and therefore would sustain the Controvention of this Search Warrant and return the documents to Mehrens. Further, this Court would order the documents and any fruits derived therefrom suppressed in response to a motion to suppress. Therefore, on the possibility this Court has misconstrued the scope of a hearing pursuant to A.R.S. 13-3922, the Court intends to hold the subject documents, and all copies made thereof, pending any Appellate review of this order by either party. If there is no such review, then the subject documents will be turned over to the Maricopa County Attorney's Office.

APPENDIX F
IN THE SUPERIOR COURT
OF
MARICOPA COUNTY, STATE OF ARIZONA

Div. 28-H August 18, 1980 HON. WILLIAM P. FRENCH, Judge

(MINUTE ENTRY)

(Title of Action; see p. 1a *supra*.)

This matter having been under advisement,

The letters obtained by defendant's counsel from his client are protected from disclosure by the attorney-client privilege. To deny the motion would violate the clients Fifth Amendment privilege against self-incrimination, and Sixth Amendment rights to assistance of counsel and private consultation with his lawyer.

For these reasons,

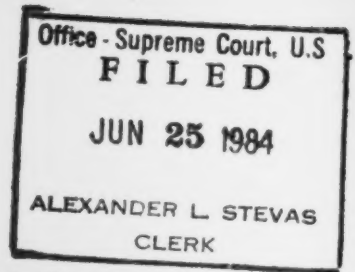
IT IS ORDERED the Motion to Quash the Subpoena is granted.

APPENDIX G

Arizona Revised Statutes.**§ 13-3922. Controverting grounds for issuance; procedure;
restoration of property**

If the grounds on which the warrant was issued are controverted, the magistrate shall proceed to take testimony relative thereto. The testimony given by each witness shall be reduced to writing and certified by the magistrate. If it appears that the property taken is not the same as that described in the warrant, or that probable cause does not exist for believing the items were subject to seizure, the magistrate shall cause the property to be restored to the person from whom it was taken, provided that the property is not such that its possession would constitute a criminal offense.

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No. 83-1654



**In The
Supreme Court of the United States**

October Term, 1983

CRAIG MEHRENS,

Petitioner,

v.

THE STATE OF ARIZONA,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS,
STATE OF ARIZONA,
DIVISION ONE**

BRIEF IN OPPOSITION

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I

QUESTIONS PRESENTED

I

DOES THE EXECUTION OF A SEARCH WARRANT ON A NON-SUSPECT ATTORNEY'S BRIEFCASE FOR INCRIMINATING LETTERS AUTHORED BY THE CLIENT TO A THIRD PARTY VIOLATE THE REASONABLENESS CLAUSE OF THE FOURTH AMENDMENT, THE CLIENT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, AND THE ATTORNEY-CLIENT PRIVILEGE?

II

DOES THE FOURTH AMENDMENT PERMIT "PROSPECTIVE" OR "ANTICIPATORY" WARRANTS, THAT IS, THE ISSUANCE OF A SEARCH WARRANT FOR ITEMS STATED IN THE WARRANT, WHEN THE AFFIDAVIT ESTABLISHES THAT THE ITEMS WOULD BE SUBJECT TO SEIZURE AT A PARTICULAR PLACE AND AT A REASONABLE TIME IN THE FUTURE?

PARTIES INVOLVED

The caption of the case before this Court contains names of all parties to the proceeding whose judgment is sought to be reviewed.



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ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS,
STATE OF ARIZONA,
DIVISION ONE

BRIEF IN OPPOSITION

Now comes the State of Arizona, Respondent, and prays this Court to deny Petitioner's Petition for a Writ of Certiorari to the Court of Appeals of the State of Arizona, Division One, for review of a judgment entered in the above-entitled cause on September 13, 1983.

JURISDICTION

Respondent accepts and adopts Petitioner's jurisdictional statement of this matter.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Sixth Amendment to the United States Constitution provides, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

. . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

Ronald Anthony Wayman allegedly engaged in certain sexual conduct with his minor daughter, Sandra Marie Wayman,

in 1979. Subsequent thereto, she left Arizona to live in California. While Sandra Marie Wayman lived in California, Wayman wrote and mailed numerous letters to her in which, assertedly, the sexual conduct was discussed. According to Sandra, those letters featured statements by Wayman, "saying that he was sorry for what he had done and telling what he had done." In March, 1980, Sandra returned to her parents' home in Arizona, bringing the letters with her. On July 3, 1980, she again left home, but did not take the letters with her or give them to her father. One week later, a criminal complaint in this case was filed. A search warrant was issued to obtain certain incriminating items from the Wayman's residence, including these letters addressed to Sandra Marie Wayman. These letters, however, were not found in the search, because prior to the search, Wayman delivered these letters to Craig Mehrens, an attorney licensed to practice in Arizona.

Subsequently, a grand jury investigation convened. A subpoena duces tecum was issued to Ronald Wayman's attorney, Craig Mehrens, directing him to produce "any and all personal letters written to Sandra Marie Wayman by Ronald A. Wayman between August 1979 and March 1980 and delivered to Pomona, CA; Stanton, CA; and Roland Heights, CA." Mr. Mehrens refused to comply with the subpoena and moved to have it quashed on the grounds that it violated the attorney-client privilege. However, Mehrens delivered the subpoenaed documents to the trial court pending a ruling, and after a hearing on the matter, the motion was granted.

Thereafter, the State filed a Petition for Special Action in the Arizona Supreme Court to contest the ruling. Pursuant to the petition and over a vigorous objection by Mehrens, the trial court was ordered to "retain custody and control of

the subpoenaed documents during the pendency" of the special action. The Arizona Supreme Court accepted jurisdiction in the matter and issued its opinion on January 27, 1981. The Supreme Court affirmed the trial court's decision, holding that Mr. Mehrens could not be compelled to produce the letters pursuant to a subpoena duces tecum, but left unresolved the issue of whether the letters could be obtained by another means. *State v. Superior Court of Maricopa County*, 128 Ariz. 253, 625 P.2d 316 (1981).

Before the Supreme Court of Arizona issued a final mandate, however, Mr. Mehrens obtained a release of these letters in an *ex parte* appearance before the trial court on February 2, 1981. Mehrens was subsequently ordered to return the letters to the trial court, when the prosecutor objected to their earlier release. Counsel for Mehrens appeared before the trial court on February 2, 1981, and advised the court that Mehrens no longer had the documents in his possession. Mehrens ultimately returned the letters to the court, when a compliance hearing was scheduled.

The State then made a request to have the trial court release the letters. After hearing argument, the trial court denied the request and ordered Mehrens to pick up the letters before 9:00 o'clock the following morning, March 4, 1981.

While the letters were still being held by the trial court, the State obtained a warrant directed to a search of Mr. Mehrens on the morning that he was to pick up the letters at the courthouse. The search warrant authorized the seizure of "a sealed envelope containing personal letters written to Sandra Marie Wayman by Ronald A. Wayman."

On March 4, 1981, Craig Mehrens appeared before the trial court, obtained custody of the letters, and informed the trial

court that he anticipated that a search warrant would be served on him when he left court that morning. When Mehrens left the court chambers, two police officers served him with the search warrant. Mehrens refused to voluntarily comply with the warrant and his brief case containing the letters was then seized. The briefcase was taken to the prosecutor's office and opened. Inside was a manila envelope that was addressed to Judge French from Mr. Mehrens. The envelope was removed from the briefcase and identified as the item to be seized. No further inventory was done on the contents of Mr. Mehrens' briefcase. The envelope was opened and the letters addressed to Sandra Marie Wayman were found inside.

Mehrens, through counsel, then filed a motion to contravene the search warrant, challenging probable cause and reasonableness, and alleging a violation of his client's Sixth Amendment right to effective assistance of counsel. After an evidentiary hearing, Judge Stephen Scott ruled that the search warrant involved in Petitioner's matter fully complied with the requirements of probable cause and specificity; that the search warrant did not authorize a general, exploratory rummaging of Mehrens' law office; and that the incriminating letters were not protected by the attorney-client privilege from being seized pursuant to a valid search warrant. Judge Scott further ruled that the attorney-client privilege could not be used as a shield by Mr. Mehrens to the search warrant in question, because Ronald Wayman would not be privileged from having the letters seized pursuant to a valid search warrant:

"The law seems clear that if an individual's privilege against self-incrimination would render that individual privileged from producing documents and/or evidence, then an attorney to whom such documents or evidence has been transferred to further his legal representation,

would also be privileged from producing that document or evidence. That is the situation in the present case in relation to obtaining the documents pursuant to a subpoena, *State of Arizona ex rel. Hyder v. Superior Court of Maricopa County, Arizona, et al.*, (No. 15022, Supreme Court of Arizona, January 27, 1981). However, in the opinion of this court, Ronald Wayman himself would not be privileged from having the subject documents seized pursuant to a valid search warrant and, therefore, even though these documents were transferred to Mehrens in furtherance of Mehrens' legal representation of Wayman, the attorney-client privilege is not a valid shield to the search warrant in question.

"The Supreme Court of the United States has stated:

' . . . pre-existing documents which could have been obtained by court process from the client when he was in possession may also be obtained from the attorney by similar process following transfer by his client in order to obtain more informed legal advice, *Fisher v. United States*, 425 U.S. 391, 403 (1976).' " (Petitioner's Appendix E).

A timely appeal was filed. Five issues were raised by Appellant on appeal, including (1) whether the trial court erred in finding probable cause to support the issuance of the search warrant, and (2) whether the attorney-client privilege protected these letters from seizure pursuant to a search warrant.

The Court of Appeals of Arizona, noting that Petitioner misconstrued the holding of the Supreme Court of Arizona in *State v. Superior Court of Maricopa County*, 128 Ariz. 253, 625 P.2d 316 (1981), held that there was probable cause for the issuance of the search warrant and that the attorney-client privilege did not attach to the letters. The attorney-client privilege did not bar the seizure of these letters pursuant to a valid search warrant. Since the letters could be seized from Wayman, they could likewise be seized from his

lawyer under a proper warrant. *Mehrens v. State*, ___ Ariz. ___, 675 P.2d 718 (Ct. App. 1983). Mr. Mehrens' petition for review was denied by the Arizona Supreme Court on January 10, 1984.

REASONS FOR DENYING THE WRIT

I

THE ARIZONA DECISION THAT THE EXECUTION OF A SEARCH WARRANT ON A NON-SUSPECT ATTORNEY'S BRIEFCASE FOR INCRIMINATING LETTERS AUTHORED BY HIS CLIENT TO A THIRD PERSON DOES NOT VIOLATE THE ATTORNEY-CLIENT PRIVILEGE IS ACCURATE AND CORRECT AND IS CONSISTENT WITH PREVIOUS OPINIONS FROM THIS COURT.

The Minnesota Supreme Court in *O'Connor v. Johnson*, 287 N.W.2d 400 (Minn. 1979), in granting a writ of prohibition, held that a search warrant based on probable cause for a non-suspect attorney's office was unreasonable, ". . . [I]n the light of the attorney-client privilege, client confidentiality, the work product doctrine, and the [criminal defendant's] constitutional right to counsel." The Supreme Court of Minnesota set forth a subpoena preference rule, recommending that law enforcement officers proceed by subpoena duces tecum in seeking documents held by a lawyer.

The Minnesota decision is at odds with this Court's holding in *Zurcher v. The Stanford Daily*, 98 S. Ct. 1970, 436 U.S. 547, 56 L. Ed. 2d 528 (1978), that the Fourth Amendment to the United States Constitution does not require a subpoena preference rule when law enforcement officers seek evidence in the possession of a non-suspect third party.

The Arizona decision in *Mehrens v. State*, ___ Ariz. ___, 675 P.2d 718 (Ct. App. 1983), is accurate and correct and

is in accord with earlier pronouncements from this Court. The Arizona court held that the attorney-client privilege did not attach to these letters and that the attorney-client privilege could not be used as a shield to bar seizure of this incriminating evidence pursuant to a valid search warrant:

“to so hold would mean that a defendant could shield the evidence by the simple expedient of delivering it to his attorney.” — *Ariz.* —, 675 P.2d at 721.

The Arizona decision is consistent with the holding in *Fisher v. United States*, 425 U.S. 391, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976), wherein this Court inquired whether the attorney-client privilege applied to documents in the hands of an attorney which would have been privileged in the hands of the client by reason of the Fifth Amendment:

“... pre-existing documents which could have been obtained by court process from the client when he was in possession may also be obtained from the attorney by similar process following transfer by the client in order to obtain more informed legal advice.” *Fisher v. U.S.*, 425 U.S. 391, 403, 96 S. Ct. 1569, 1577.

If the client could be compelled to produce incriminating evidence, then the attorney cannot refuse. Had a search warrant been served on Wayman when he was in possession of the letters, Wayman could not have used the attorney-client privilege to shield the seizure of these letters. Mehrens, as Wayman's attorney, stood in Wayman's shoes. *Fisher v. United States*, *supra*. Even though these letters were transferred to Mehrens in furtherance of Mehrens' legal representation of Wayman, the attorney-client privilege was not a shield against the seizure of these incriminating letters from Mehrens pursuant to a valid search warrant.

The policy behind the attorney-client privilege is to afford

the client freedom from fear of compulsory disclosure after consulting his legal advisor. The privilege is designed to facilitate the free exchange of information between the client and his attorney. The attorney-client privilege is not absolute and must be balanced against the public's interest in a criminal investigation process. No privilege attaches to a document merely by reason of its passage from an attorney to his client or vice versa, especially where the document, as here, existed prior to the formation of the attorney-client relationship. The attorney-client privilege does not give an attorney the right to withhold incriminating evidence that is given to him by his client, because it would be an abuse of the lawyer's professional responsibility to the court to knowingly take possession and secrete instrumentalities or evidence of a crime.

A client's delivery of documentary evidence to his attorney may be privileged, but not the object itself. A party is privileged from producing the evidence, but not from its production. *Johnson v. United States*, 228 U.S. 457, 33 S. Ct. 572, 57 L. Ed. 919 (1913). The attorney-client privilege cannot be used as a shield against a valid search warrant, when the attorney is required to voluntarily disclose the incriminating documents to the authorities after he has retained it for a reasonable time to aid him in preparing his client's case. Because the attorney-client privilege affords no protection to the incriminating letter, the privilege would not bar the seizure of the letter from Wayman or his attorney pursuant to a valid search warrant. To hold otherwise would provide a mechanism by which a lawyer could become a repository of the fruits or evidence of a crime. This would pervert the truth-seeking interests of the administration of justice and could allow the subjective ethical stance of a lawyer to

dictate what and when incriminating evidence would be disclosed to the prosecution.

The attorney-client privilege does not bar seizure of incriminating evidence from a lawyer pursuant to a valid search warrant, even though the attorney is a non-suspect third party and there is no reasonable expectation that the incriminating evidence will be destroyed. This Court held in *Zurcher v. The Stanford Daily*, 436 U.S. 547, 98 S. Ct. 1970, 56 L. Ed. 2d 528 (1978), that:

“Valid warrants may be issued to search any property, whether or not occupied by a third party, at which there is probable cause that fruits, instrumentalities or evidence of a crime will be found.” 436 U.S. 547, 554, 98 S. Ct. 1970, 1975.

The fact that the non-suspect third-party custodian of incriminating evidence is an attorney is inconsequential, when the attorney-client privilege offers no protection from a valid search warrant.

Police officers did not act unreasonably in seizing the briefcase from Mehrens. The police seized the briefcase from Mehrens, when he refused to voluntarily comply with the search warrant, and only after he was first searched. It was reasonable to assume that the letters would be in his briefcase, after it was determined that they were not on his person.

II

ARIZONA'S DECISION IS CORRECT AND ACCURATE AND IS CONSISTENT WITH THIS COURT'S HOLDING IN *FISHER V. UNITED STATES*, 425 U.S. 391, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976).

This Court in *Fisher v. United States*, *supra*, recognized those policy considerations underlying the purpose of the attorney-client privilege:

"However, since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. Accordingly, it protects only those disclosures—necessary to obtain informed advice which may have been made absent the privilege. . . . This court and the lower courts have thus uniformly held that pre-existing documents which may have been obtained by court process from the client when he was in possession may also be obtained from the attorney by similar process following transfer by the client in order to obtain more informed legal advice." 425 U.S. 391, 403, 96 S. Ct. 1569, 1577.

The Arizona Court recognized that a defendant could not shield incriminating evidence from a valid search warrant by simply delivering the incriminating evidence to his attorney. The letters were not protected by the attorney-client privilege and could be seized from the attorney under a proper warrant because they could be seized from Wayman himself.

These two decisions are compatible and need no further explanation. The attorney-client privilege is not absolute. It applies only where necessary to achieve its purpose. Incriminating evidence delivered to a criminal defense attorney by his client may be withheld by the lawyer for a reasonable time to aid him in preparing his client's case and then must be voluntarily given to the authorities. *State ex rel. Sowers v. Olwell*, 64 Wash. 2d 828, 394 P.2d 681 (1964). The attorney-client privilege does not protect incriminating evidence that the client had in his possession and that predates the attorney-client relationship. Otherwise, the client could use his attorney as a repository for incriminating evidence and shield the evidence by simply delivering it to his attorney. Since the attorney-client privilege does not protect pre-existing incriminating evidence that is given by the client to his attorney, this privilege should not bar the seizure of this evidence from either the client or the lawyer pursuant to a

valid search warrant. The seizure of this evidence through the use of a valid search warrant does not deprive the client of effective assistance of counsel, because counsel is not compelled to divulge the source of the incriminating evidence or his client's communications. The purpose of the attorney-client privilege is not subverted, when as here, counsel does not aid in the discovery or authentication of the incriminating documents.

Also, the warrant requirement of the Fourth Amendment of the United States Constitution, and not the attorney's ethical stance, protect against the harms that are assertedly threatened by warrants directing the search of attorneys' briefcases or offices:

"... Further, the prior cases do no more than insist that the courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by this search. . . . Properly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices." *Zurcher v. The Stanford Daily*, 436 U.S. 547, 565, 98 S. Ct. 1970, 1981-82.

The detached and neutral magistrate can eliminate these suggested hazards by confining warrants to searches within reasonable limits and issuing search warrants on "probable cause", and "particularly describing the places to be searched and the person or things to be seized." *Zurcher v. The Stanford Daily*, *supra*.

III

THE FOURTH AMENDMENT WARRANT PROCESS
PERMITS THE ISSUANCE OF ANTICIPATORY
SEARCH WARRANTS AT A TIME PRIOR TO THE
ACTUAL ARRIVAL OF THE MATTER TO BE SEIZED
AT THE PREMISES.

The Arizona Court did not create a completely new rule of law when it held that the "prospective" or "anticipatory" search warrant below was valid under the Fourth Amendment:

"The test to determine if probable cause exists for the issuance of a search warrant is the same for present as well as prospective warrants; namely, whether the evidence presented in support of the warrant creates a substantial probability that the seizable property will be located at the place authorized to be searched by the warrant." *Mehrens v. State*, ___ Ariz. ___, 675 P.2d 718, 721 (Ct. App. 1983).

An anticipatory search warrant is not a novel invention. This Court in *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), and in *Berger v. New York*, 388 U.S. 41, 87 S. Ct. 1873, 18 L. Ed. 2d 1040 (1967), indicated that it was constitutionally permissible to obtain a search warrant for the seizure of oral communications through the use of electronic surveillance:

"... it is clear that this surveillance was no narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it [the electronic surveillance] was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized . . . the . . . search and seizure . . ." *Katz v. United States*, 389 U.S. 347, 354, 88 S. Ct. 347, 507, 513.

This acknowledgment that warrants may be directed to unspoken words that would not be in existence until vocalized

in the future suggests that search warrants may be prospective or anticipatory to the seizure of items.

A search warrant may be issued in advance of the time that the incriminating document may be seized on particularly described premises. In the case below, a search warrant was issued during the morning hours of March 4, 1981. The search warrant directed the seizure of "a sealed envelope containing personal letters written to Sandra Marie Wayman by Ronald A. Wayman", which the magistrate had found probable cause to believe were on the persons of "Craig Mehrens of his agent" and on the premises known as "Maricopa Superior Court Building, 101 West Jefferson, East Court Building".

The scope of the search warrant was limited, reasonable and not general. The search warrant did not authorize exploratory rummaging. It particularly described the place and person to be searched and items to be seized. The affidavit established that the letters would be subject to seizure at a reasonable time in the future. The search warrant was issued during the morning hours of March 4, 1981, and the affidavit indicated that, by court order, Mr. Mehrens would have to "obtain the sealed documents no later than 9 a.m. on March 4, 1981, from Judge French's court". This anticipatory search warrant did not call for execution beyond a reasonable time. The affidavit did not indicate that there would be an undue passage of time between the issuance and execution of the search warrant that would raise the danger that the letters described in the affidavit would no longer exist on the premises to be searched. There was probable cause to believe that Mr. Mehrens would comply with Judge French's order and reclaim the sealed envelope by 9 a.m. on March 4, 1981. There was probable cause to believe that the search warrant

would not be executed until Mehrens went to "Judge French's court" and took custody of the incriminating letters. There was no danger that the letters would be seized at a time or place different from that indicated in the affidavit.

This Court should deny the Petition for Writ of Certiorari, because this Court recognized the validity of "prospective" or "anticipatory" search warrants in *Katz v. United States, supra*. The Arizona Court's opinion was accurate and correct and consistent with this Court's opinion in *Katz v. United States, supra*.

CONCLUSION

For all these reasons, Petitioner's Petition should be denied.

Respectfully submitted,

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